IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR

TUESDAY, THE 7TH AUGUST 2007 / 16TH SRAVANA 1929

WP(C).No. 15898 of 2007(P)

PETITIONER:

M/S.R.K.LATEX PRIVATE LIMITED,
ANAMALAIS HOUSE ANNEXE, CHEMBUKAVU,
THRISSUR- 680 020, REPRESENTED BY ITS
SENIOR MANAGER (SALES),
MR.D.DHARMARAJ.

BY SR. ADV. SRI.ARSHAD HIDAYATULLAH
SRI.L.RAJESH NARAYAN

RESPONDENTS:

STATE OF KERALA REPRESENTED BY THE
SECRETARY TAXES,
SECRETARIAT, TRIVANDRUM.

BY G.P. SRI.C.K.GOVINDAN

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 07/08/2007, ALONG WITH WPC NO. 15939 OF 2007 WPC NO. 15941 OF 2007 & WPC NO. 15942 OF 2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.R.

C.N.RAMACHANDRAN NAIR, J.

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W.P.(C) Nos.15898, 15939, 15941 & 15942 of 2007

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Dated this the 7th day of August, 2007.

JUDGMENT

These connected writ petitions are filed challenging orders issued by the Sales Tax Appellate Tribunal rectifying common orders issued by them in the appeals filed against sales tax assessments under the local Act and under the Central Sales Tax Act for the assessment years 1998-99 and 1999-2000. The petitioner, a small scale industrial unit, was engaged in purchase of field rubber latex, conversion of the same to centrifuged latex or creamed latex and sale of the said products both local and interstate. Natural rubber in all it's forms including field latex and centrifuged latex during the relevant time were covered by the same entry in the First Schedule to the KGST Act taxable at the point of last purchase in the State. Even though this court in the decision in M/S.SUPERSONIC INDUSTRIAL COMPLEX, MUVATTUPUZHA V. DEPUTY COMMISSIONER OF SALES TAX (2002) 10 KTR 202 held that centrifuged rubber is a manufactured product which would have led to tax liability on purchase turnover of field latex for the petitioner, the Full Bench of this court in KURIAN ABRAHAM(P) LTD. V. ASST.

COMMISSIONER 2004(1) KLT 498 held that both field latex and centrifuged latex having been included in the same entry are one and the same. The Government had also through notification SRO 695/2003 dated 25.7.2003 granted retrospective exemption from payment of purchase tax on field latex. When appeals against orders of first appellate authority came up before the Tribunal, the Tribunal referred to the above two decisions of this court and various decisions of the Supreme Court on test of manufacture namely, UNION OF INDIA V. HUF BUSINESS known as RAMLAL MANSUKHRAL (1971) I SCR 936, EMPIRE INDUSTRIES LTD. & ANOTHER V. UNION OF INDIA 162 ITR 846, DY. COMMISSIONER OF SALES TAX V. PIO FOOD PACKERS (1980) 46 STC 631 and the decision of this court in KANAM LATEX'S case (1996 KLT Tax Cases 210) and held that the Full Bench decision of this court in KURIAN ABRAHAM's case is not the law to be followed and appeals were accordingly disposed of vide common order produced as Ext.P1 in the connected cases. However, the Tribunal later initiated suo moto rectification proceedings under Section 43 of the KGST Act and modified Ext.P1 order through Ext.P2 whereunder they have held that the Full Bench decision in KURIAN ABRAHAM's case abovereferred is applicable in the case. The rectified order has resulted in adverse consequence for the petitioner in as much as petitioner will be liable to pay CST at higher rate over the 4% remitted by the petitioner as a small scale industrial unit

engaged in manufacture only is entitled to concessional rate. Therefore, petitioner has filed the W.Ps. challenging Ext.P2 on the ground that there is no justification to modify the earlier appellate order as there was no apparent mistake that could be rectified under Section 43 of the KGST Act.

2. I heard Senior counsel Sri.Arshad Hidayathulla, appearing for the petitioner and learned Government Pleader appearing for the respondents. The short question to be considered is whether Ext.P2 proceedings issued by the Tribunal under Section 43 of the KGST Act is justified or not. For easy reference the said Section is extracted hereunder:

"S.43:- Power to rectify any error apparent on the face of the record:- (1) An assessing authority or an appellate or revising authority (including the Appellate Tribunal) may, on application or otherwise, at any time within three years from the date of any order passed by it, rectify any error apparent on the face of the record:

> Provided that no such rectification which has the effect of enhancing an assessment or any penalty shall be made unless such authority has given notice to the person affected and has allowed him a reasonable opportunity of being heard.
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> (2) Where such rectification has the effect of reducing an assessment or penalty, the assessing authority shall make any refund to the person entitled thereto.
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> (3) Where any such rectification has the effect of enhancing an assessment or penalty, the assessing authority shall give the dealer or other person a revised notice of assessment or penalty, and thereupon the provisions of this Act and the rules made thereunder shall apply as such notice had been given in the first instance.

Explanation:- The liability to pay the tax or other amount will arise only from the date specified in the revised notice."

From the wording of the above Section it is clear that what could be done in a proceeding under Section 43 is only to rectify any error apparent on the face of the record. The Tribunal also has the authority to rectify mistakes in their orders. However, the question is whether the Tribunal was justified in invoking powers under Section 43 in this case. It is not in dispute that the sole ground on which Tribunal invoked the jurisdiction under Section 43 is that while disposing of the appeal in the first round through Ext.P1 order, they did not follow the Full Bench decision of this court in KURIAN ABRAHAM's case abovereferred. In fact, in the rectified order also they have not decided the appeal based on the ruling of this court in the said Full Bench decision. Senior Counsel appearing for the petitioner rightly pointed out that there was no mistake on the face of the order of the Tribunal warranting correction under Section 43 because the Tribunal itself has in Ext.P1 discussed in detail several decisions of the Supreme Court and this court including the Full Bench decision based on which rectification order was later passed and then came to the conclusion that the Full Bench decision cannot be applied to the facts of petitioner's case. On going through Ext.P1, I find there is elaborate discussion by the Tribunal with reference to all decisions including the Full Bench decision abovereferred and they concluded the case following certain decisions of the Supreme

Court and of this court and by simultaneously holding that the abovereferred Full Bench decision is not applicable. When apparently conflicting judgments of the jurisdictional High Court and the Supreme Court are available, it is for the Tribunal to analyse the facts of the case and to apply the law declared by the Supreme Court and the High Court. It is quite possible that the Tribunal may commit a mistake in following one decision against another. If such a decision is wrong, it is only to be corrected by the High Court in revisional jurisdiction and not to be reversed by the Tribunal by changing their earlier opinion in rectification proceeding. It is clear from the two detailed orders namely, Exts.P1 and P2 passed by the Tribunal that the matter is capable of different conclusions and the High Court itself has expressed divergent view in different judgments. Therefore, the issue was highly debatable on which no rectification is permissible as held by the Supreme Court in the decision cited by counsel for the petitioner in 82 ITR 50 where the Supreme Court has held that a debatable point is not a mistake apprent from the record of the case. This view is supported by decision of the Supreme Court in VARDHMAN SPINNING MILL's case reported in 226 ITR 296 where the court has held that when two views are possible, the earlier decision cannot be subject matter of rectification. Therefore, I hold that the Tribunal wrongly invoked jurisdiction under Section 43 of the KGST Act to correct their earlier order. Ext.P2 order of rectification issued and produced in all the W.Ps. are accordingly set aside.

4. Government Pleader in the course of argument submitted that the original order of the Tribunal was not accepted by respondents. However, by the time they took steps for filing revision petitions, the Tribunal initiated rectification proceeding which ended up in the impugned orders. As Tribunal has rectified earlier orders in favour of the Revenue, revision could not be filed is what is stated by him. I do not think there is any need for this court to express any view about the correctness or otherwise of the original order namely Ext.P1 which now stands restored by virtue of this judgment setting aside Ext.P2 orders produced in all the W.Ps. It is upto the respondents to challenge first order issued by the Tribunal in appropriate proceedings, if so advised.

The W.Ps. are allowed as above.

C.N.RAMACHANDRAN NAIR
Judge

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